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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 18

CHARLES McLAURIN,

*Petitioner,*

vs.

WILLIAM C. BURNLEY, JR., Custodian
of the Greenville City Jail,

*Respondent.*

## REPLY BRIEF OF RESPONDENT

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## INDEX


Citations ..... II

Brief of Argument ..... 1

Question Presented ..... 5

Supplemental Facts ..... 6

Reply to Reasons for Granting the Writ—

I. The question of whether the Mississippi breach of the peace statute, Mississippi Code of 1942 (Recompiled), §2089.5 is unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech has already been passed on by this Court; the only question remaining on the record again before this Court is whether the federal district and appellate courts made a fair determination that the state courts afforded petitioner fair trials, fair appellate review, fair protection to his constitutional rights, and whether the result was supported by competent evidence ..... 10

II. In determining whether §2089.5 is unconstitutional as infringing upon petitioner's First Amendment rights, it must be examined as construed and applied by the state courts ..... 15

A. Both the trial court and the Supreme Court of Mississippi narrowly construed and narrowly applied §2089.5 to preserve petitioner's First Amendment rights ..... 15

B. §2089.5 is neither vague nor overbroad ..... 21

C. As applied in this case, §2089.5 is constitutional ..... 25

D. There is no relationship between *Gunn* v. *University Committee to End the War in Viet Nam* and the case at bar which would justify the granting of certiorari ..... 29

III. Strong Policy Considerations Require That Petitioner Now Pay the Penalty for His Actions .... 32

Conclusion ..... 34

Certificate ..... 35

**Citations**

CASES

*Adderley* v. *Florida*, 385 U.S. 39 (1966) .....31, 32

*Allison* v. *Holman*, 326 F.2d 294 (CA 5, 1963), cert. den., 376 U.S. 957 (1964) .....12, 13

*Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So.2d 667 (1965) .....19, 20, 28, 30

*Brown* v. *Allen*, 344 U.S. 443 (1953) .....11, 13

*Cameron* v. *Johnson*, ..... U.S. ....., 20 L.Ed.2d 183 (1968) .....24, 33

*Cheatham* v. *State*, 67 Miss. 335, 7 So. 204 (1889) ..... 17

*Chicago, St. P., M. & O. Ry. Co.* v. *Kulp*, 102 F.2d 352 (CA 8, 1939), cert. den., 307 U.S. 636 (1939) ..... 11

*Cox* v. *Louisiana*, 379 U.S. 536 (1965) (*Cox I*) ....27, 28, 31, 33

*Cox* v. *Louisiana*, 379 U.S. 559 (1965) (*Cox II*) .....24, 28, 33

*Edwards* v. *South Carolina*, 372 U.S. 229 (1963) .....27, 28

*Fay* v. *Noia*, 372 U.S. 391 (1963) ..... 12

*Feiner* v. *New York*, 340 U.S. 315 (1951) .....25, 26, 27

*Greenwood* v. *Peacock*, 384 U.S. 808 (1966) ..... 32

*Gunn* v. *University Committee to End the War in Viet Nam*, Oct. Term, No. 269, Slip Opinion, p. 2, Footnote 1 .....29, 30

*Illinois Central R. Co.* v. *Harper*, 83 Miss. 560, 35 So. 764 (1903) ..... 17

*Lee* v. *Alabama*, 364 F.2d 945 (CA 5, 1966) .....12, 13

*McLaurin* v. *Burnley*, 279 F.Supp. 220 at 222 (ND Miss., 1967) .....13, 14, 26, 34

COPY BOUND CLOSE IN CENTER

*McLaurin* v. *City of Greenville*, 187 So.2d 854, 859 (Miss., 1966) ..... 20, 28
*McLaurin* v. *Greenville*, 385 U.S. 1011 (1967) ..... 5, 10, 11, 28
*NAACP* v. *Button*, 371 U.S. 415 (1963) ..... 32
*Nolen* v. *Wilson*, 372 F.2d 15 (CA 9, 1967), cert. den., 387 U.S. 948 (1967) ..... 13
*Schenk* v. *U. S.*, 249 U.S. 47, 53 (1919) ..... 15, 28
*Terminiello* v. *Chicago*, 337 U.S. 1 (1949) ..... 27
*U. S.* v. *Petrillo*, 332 U.S. 1 (1947) ..... 21
*U. S.* v. *Woodward*, 376 F.2d 136 (CA 7th, 1967) ..... 21, 22, 23, 31
*White* v. *Higgins*, 116 F.2d 312 (CA 1, 1940) ..... 11
*Wright* v. *City of Montgomery*, 282 F.Supp. 291 (DC, MD, Ala., 1968) ..... 23
*Zwickler* v. *Koota*, 389 U.S. 241 (1967) ..... 24

OTHER

1 *Alexander, Mississippi Jury Instructions* (1953) §10 ..... 17
1 *Alexander, Mississippi Jury Instructions* (1953) §224 ..... 18

STATUTES

§1530, Mississippi Code of 1942 (Recompiled) ..... 4, 16
§2087.5, Mississippi Code of 1942 (Recompiled) ..... 19
§2089.5, Mississippi Code of 1942 (Recompiled) ..... 1, 2, 3, 4, 10, 15, 21, 25

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

## No. 698

CHARLES McLAURIN,

*Petitioner,*

vs.

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

*Respondent.*

## REPLY BRIEF OF RESPONDENT

## BRIEF OF ARGUMENT

I

The question of whether the Mississippi breach of the peace statute, Mississippi Code of 1942 (Recompiled), §2089.5 is unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech has already been passed upon by this Court; the only question remaining on the record again before this Court is whether the federal district and appellate courts made a fair determination that the state courts afforded

petitioner fair trials, fair appellate review, fair protection to his constitutional rights, and whether the result was supported by competent evidence.

The record presently before this Court on Petition for Certiorari to the Court of Appeals for the Fifth Circuit is the same record, identically, as that considered on former Petition for Certiorari to the Supreme Court of Mississippi. No new evidence was adduced in the federal district court on petition for habeas corpus. The only additional matter covers the proceedings in the federal district and appellate courts.

While denial of the Petition for Certiorari to the Supreme Court of Mississippi, under the rule of *Brown* v. *Allen*, may not be authority one way or another in a criminal case, it does constitute the law of this case, bringing into play the sensible rule that a court will not re-open a question already decided at an earlier stage, particularly where there is no new evidence adduced by petitioner upon his application for habeas corpus.

This leaves only the delicate question in the area of federal-state relations of when a federal court will intervene to overturn a state court criminal conviction upon a claim that constitutional rights have been violated. We believe the rule is fairly stated in the argument heading, above.

II

In determining whether §2089.5 is unconstitutional as infringing upon petitioner's First Amendment rights, it must be examined as construed and applied by the state courts.

A. Both the trial court and the Supreme Court of Mississippi narrowly construed and narrowly applied §2089.5 to preserve petitioner's First Amendment rights.

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The trial court, in its instructions to the jury, told the jurors that if they found petitioner was arrested for peaceful protest against racial segregation, they could not find him guilty. The verdict of guilty, under Mississippi practice, therefore necessarily imports an affirmative finding, on the evidence presented, that the petitioner was not simply engaged in a peaceful protest, but that he was guilty of conduct calculated to, or which might reasonably have led to a breach of the peace under the attendant circumstances.

Thus, the issue forcefully argued here by petitioner, specifically that he was arrested for a peaceful speech, is essentially a question of fact which has been specifically resolved against him by two separate juries. As once put by Mr. Justice Holmes in Schenk, "It is a question of proximity and degree," which is the classic example of the type of factual question within the province of a jury.

B. §2089.5 is neither vague nor overbroad.

The term, "breach of the peace," is one of early common law origin which has, through judicial construction from early times to the present, acquired "a fairly well defined gloss." The constitution does not require impossible standards and the necessary specificity exists where the language challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

Further, in view of the affirmative factual finding petitioner was not engaged in any peaceful protest, his conduct becomes the "hard core" type, and he may not avail himself of the "vagueness" defense.

C. As applied in this case, §2089.5 is constitutional.

Petitioner's conduct, having exceeded the bounds of peaceful protest, brings the case within the rule

of *Feiner* v. *New York*. He is not prosecuted for the content of his speech which, even assuming he had actually said what he "was going to say," was not an unpopular or controversial topic in Greenville, Mississippi. He was prosecuted for the *effect* his speech was having upon the crowd, and the City had the constitutional power to protect itself from a serious riot by removing the instigator.

The decisions of the Supreme Court of Mississippi in *McLaurin* and *Bolton*, both argued the same day, clearly show that this state refused to apply §2087.5—a statute couched in substantially the same language as §2089.5—where the defendant was engaged in constitutionally protected activities, notwithstanding the fact that the probable outcome, had those activities continued, would have been a breach of the peace.

D. There is no relationship between *Gunn* v. *University Committee to End the War in Viet Nam* and the case at bar which would justify the granting of certiorari.

In *Gunn* the three-judge court did not reach and did not decide what the rights of the state would have been had the protestors' action reached what we refer to as the *Feiner* level; i.e., could the protestors have been arrested when the hostile reaction to their unpopular views reached a riot level or a potential riot level?

The factual situation in *Gunn* is the same as presented to the Supreme Court of Mississippi in *Bolton*, where it struck down arrests of demonstrators even though reaction of hostile residents to constitutionally protected action had reached a critical stage. *Bolton* was specifically referred to in *McLaurin*, thus clearly showing that the distinction between the two is the question of whether the conduct was constitutionally protected. If pro-

tected, no arrest stands; if not protected, arrest stands provided conduct is reasonably calculated to lead to a breach of the peace.

III

Strong policy considerations require that petitioner now pay the penalty for his actions.

It is essential to the maintenance of law and order that statutes be impartially and justly applied across the board. Where one, such as the petitioner, appears to be exempt from application of reasonable state regulation as a "civil rights" worker, particularly where a substantial number of citizens *saw* the arrest and *know* why he was arrested, law enforcement suffers and may fail in critical circumstances. Liberty can exist only in an ordered society which, in turn, can exist only where reasonable laws apply alike to all, regardless of race, creed, color or unlimited legal resources.

## QUESTION PRESENTED

We respectfully differ with Petitioner as to the question presented on Petition for Writ of Certiorari.

The question posed in Petitioner's brief was presented to this Court upon Petition for Writ of Certiorari to the Supreme Court of Mississippi at the October, 1966, Term. On the record then before this Court, it either passed upon this question or declined to accept jurisdiction in *McLaurin* v. *Greenville*, 385 U.S. 1011 (1967). Except for the proceedings in the federal courts, the record is identical to that presented in the earlier case.

Consequently, while we shall attempt to meet petitioner's argument on the question posed in his petition, we submit that the only question properly before the Court on this Petition for Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit is whether the federal courts fairly determined from the record before them that the state courts gave fair consideration to the issues, reached a satisfactory result, and protected the rights of petitioner under the Constitution of the United States.

## SUPPLEMENTAL FACTS

The facts which are the basis for petitioner's arrest and subsequent prosecution occurred 1 July 1963—over five years ago. Petitioner has yet to serve a day of his sentences.

Petitioner's statement of the case would leave the impression that the content of his remarks on the occasion of his arrest was an exhortation to the assembled Negroes to register as voters. This is not factually so. It was his "intention" (R. 109), what he "had in mind" (R. 110), what "I would have brought these things out had I been given the opportunity." (R. 120)

It is unlikely, as a matter of fact, that petitioner either said or intended to say anything about voter registration. Of the 300 odd people present, of whom a large number were presumably sympathetic to petitioner, not one single witness has been adduced who could or would testify that petitioner had been urging voter registration. True, his job was voter registration. But, he had been in Greenville since September of the preceding year, some nine and one-half months, during which he made an investigation into voter registration laws and policies as applied to Negroes. He found that any qualified Negro who wanted to could become qualified to vote, and that substantial numbers of them had done so. (R. 114-117)

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Actually, a majority of the people with whom petitioner had been working were minors, under the age of 18 years, and not qualified to vote by any stretch of the imagination. (R. 119-120) There were closely related arrests of lunch counter sit-ins[1] and the park march-ins. Of 10 persons arrested for the park incident, *all* were 18 years of age and under; of 9 persons arrested for the lunch counter incident, 7 were 18 years of age or under. (R. 118-119) Petitioner had been working with and giving guidance to these minors. (R. 117-118)

What the petitioner actually *did* say is quite a different matter, regardless of what he "meant" or "had in mind" or "was going to say." Taken from his own testimony:

> "Q. And, you were asking these people, what are you going to do about it, were you not? A. I was asking them—first of all I was asking them if they were satisfied, and yes, what were they going to do about it.
>
> "Q. You did ask them what they were going to do about it? A. I did.
>
> "Q. You asked them if they were going to stand for it, did you not? A. Yes, I said are you going to stand for it.
>
> "Q. So that the testimony what [sic] the officers gave in your presence here in the Courtroom as to what you said so far as it went is correct, is it not? A. As far as they said that they heard. I said—I think that what Officer Tackett said that he only caught these very two things, I said other things before that and after.

1. Following the decision in *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964), prosecution of the lunch counter cases was voluntarily dismissed by the City of Greenville in the Supreme Court of Mississippi.

"Q. Do you deny that you said anything that the officers testified in this trial said you said? A. No.

"Q. Do you admit it? A. I admit that I said, are you going to stand for segregation, are you going to stand this, or are you going to take it?

"Q. Now then, you were making those statements to a crowd of people that you knew to be upset and shocked, is that correct? A. I was making a statement to people—let it fall on the ears of the people that would listen.

"Q. And, you knew that they seemed to be upset and shocked? A. Yes." (R. 213-214)

Officer Carson, a veteran of 13 years on the Greenville Police force, and a former military policeman (R. 36), testified, on cross-examination:

"Q. Can you tell us, as near as you possibly can, what he [petitioner] was saying—what specifically was he saying? A. I know, he said this, what you people going to do about this; this is wrong, the White Caucasian, this law is wrong; you going to take it; you going to let them get away with it. I heard those words there, and then the people began to just come in." (R. 53)

The respondent, Greenville Police Chief of 17 years experience, a graduate of the FBI Academy, and specially trained in riot control, was of the opinion that the situation was very tense, and that a riot could erupt at any minute. (R. 78) Captain Tackett, a veteran of 13 years and also a graduate of the FBI Academy was of the opinion that a breach of the peace was imminent, and that it seemed to him the crowd was going to take the situation in their own hands. (R. 66) Officer Carson testified, "Well, it had to lead to trouble, if the talking kept on." (R. 41) After petitioner had been removed from the scene, it was necessary to use 15 to 18 police officers in a

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riot formation to compress the crowd into a column and escort them some 12 to 15 blocks away. (R. 67-68)

It is important to note that after the trial had been completed, the crowd had left the courtroom and was peacefully dispersing. It was at this point that petitioner mounted the Municipal Building steps and began to shout in a loud voice. The crowd then reassembled. (R. 38, 63, 76-77) There was no doubt in the mind of any police officer present that the situation became very tense, and that violence could have erupted at any moment unless prompt action was taken to remove the catalyst—i.e., the petitioner. In fact, the petitioner, himself, testified,

> "* * * I felt that *if it was a tense situation out there* that these people would—first of all they knew, some of them, that the kids had tried to use the park. *They needed some kind of idea as to what steps to take. They were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done. But then all it needed was a leader,* * * *." (R. 202) (Emphasis added.)

Chief Burnley testified,

> "Q. Just this one further question, Chief Burnley, You heard the Defendant talking and at the same time you were observing the crowd? A. Right.
>
> "Q. What effect were the Defendant's language having on the crowd? A. They were answering him and become emotional.
>
> "Q. Was the intensity that you observed increasing or decreasing? A. Increasing." (R. 86)

## REPLY TO REASONS FOR GRANTING THE WRIT

### I

**The question of whether the Mississippi breach of the peace statute, Mississippi Code of 1942 (Recompiled), §2089.5 is unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech has already been passed on by this Court; the only question remaining on the record again before this Court is whether the federal district and appellate courts made a fair determination that the state courts afforded petitioner fair trials, fair appellate review, fair protection to his constitutional rights, and whether the result was supported by competent evidence.**

If we had a situation where petitioner had adduced additional evidence in the district court (where, for example, he might have shown that at the time of his arrest he was, in fact, urging his fellow citizens to become qualified electors), we would have a different case.

We have no such case.

The petition for writ of habeas corpus alleged no single fact not already a part of the trial record. (R. 3-9) The four reasons cited in his petition (R. 6) supporting his claim that he was in custody in violation of the Fourteenth Amendment to the Constitution of the United States paraphrase the four major divisions of "Reasons for Granting the Writ" contained in his Petition for Writ of Certiorari to the Supreme Court of the United States filed in No. 633, October Term, 1966, of this Court *sub. nom. McLaurin* v. *City of Greenville,* 385 U.S. 1011 (1967). (R. 227) The transcript of the proceedings in the County Court of Washington County, Mississippi, filed with respondent's answer under the certificate of the trial judge, is precisely the same transcript reviewed by this Court in the earlier proceedings. (R. 15-225)

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When respondent, in the district court, filed a motion seeking, in the alternative, that the case be set for hearing or that it be summarily disposed of on the basis of the sworn answer, certificate of trial court, decision of the Supreme Court of Mississippi, petition for writ of certiorari filed with this Court and reply brief to that petition (R. 228-235), petitioner withdrew his request for an evidentiary hearing. (R. 236, 237)

Consequently, it is fair to say that there is *no* new evidence before this Court, and nothing for this Court to review that it has not already reviewed *except* the proceedings in the federal courts on habeas corpus.

The action of this Court in denying the earlier petition for certiorari, therefore, becomes the "law of the case" on the question raised by petitioner for the second time here. The doctrine of the "law of the case," as we understand it, is merely a sensible practice of courts generally to refuse to reopen what has already been decided, although not a limit to its power.

*White* v. *Higgins,* 116 F.2d 312 (CA 1, 1940).

The rule applies with even greater force where no substantially new evidence appears on the second review,

*Chicago, St. P., M. & O. Ry. Co.* v. *Kulp,* 102 F.2d 352 (CA 8, 1939), cert. den., 307 U.S. 636 (1939)

and should apply *a fortiori* where there is no new evidence at all.

Since *Brown* v. *Allen,* 344 U.S. 443 (1953), denial of certiorari in a criminal case appears to have no particular meaning, but the fact that three Justices dissented in this case on the earlier petition for writ of certiorari at least strongly suggests that something was decided in this particular case.

*McLaurin* v. *City of Greenville, supra.*

Somewhere along the line, there should be an end to litigation of this sort.

See: *Allison* v. *Holman*, 326 F.2d 294 (CA 5, 1963), cert. den., 376 U.S. 957 (1964);

*Lee* v. *Alabama*, 364 F.2d 945 (CA 5, 1966).

Application of the "law of the case" doctrine in a situation where, as here, there is absolutely no new evidence, no new law and no new arguments since the last consideration of these facts on petition for certiorari, would, we submit, have two desirable results: (1) it would somewhat enlighten the working bar as to how far the *Brown* v. *Allen* rule goes, and (2) it should relieve this Court of the burden in having to reconsider appeals based on the same facts and issues.

Turning now to the only new matter before this Court, the action of the district court and the court of appeals, there is no question but that the federal courts, on habeas corpus, have the power, and indeed the duty, to inquire into whether petitioner's constitutional rights have been violated.

*Fay* v. *Noia*, 372 U.S. 391 (1963).

The problem is defining the scope of that inquiry, and we think the rule is well stated in a recent case as follows:

> "Denial of due process within the meaning of the Constitution of the United States in the trial of a criminal case in a state court sufficient to justify federal court interference is 'the failure to observe that fundamental fairness essential to the very concept of justice.' [Citations omitted] '[I]n the ordinary case of this kind a United States Court will refuse to grant habeas corpus if it is satisfied from the record as a

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whole that the state courts gave fair consideration to the issues, reached a satisfactory result, and protected the rights of the petitioner under the Constitution of the United States.' Hendrix v. Hand, supra, 312 F.2d at 149."

*Nolen* v. *Wilson*, 372 F.2d 15, 17 (CA 9, 1967), cert. den., 387 U.S. 948 (1967).

See, also: *Allison* v. *Holman, supra;*
*Lee* v. *Alabama, supra.*

In *Brown* v. *Allen, supra,* Mr. Justice Reed, in that portion of the opinion with which a majority concurred, pointed out this basic limitation which should be observed by federal courts in limiting the scope of the inquiry:

"* * * Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions should not be exercised without clear evidence of violation."
344 U.S. at 482.

Applying these principles to the case at bar, the record affirmatively discloses:

(1) The entire record was carefully considered and the district court independently found that the merits of the factual dispute were adequately developed and resolved in the state courts; that the conclusions of the state courts were supported by the record; that the state employed an adequate fact-finding procedure; and that there are no allegations of newly discovered evidence.

*McLaurin* v. *Burnley,* 279 F.Supp. 220 at 222 (ND Miss., 1967), opinion adopted *per curiam* by Court of Appeals for the Fifth Circuit, Petitioner's brief, Appendix 1a.

(2) The district court independently applied federal law to the state court findings of fact and reached the conclusion:

> "By this statute, the State of Mississippi proscribes only nonpeaceful speech, speech calculated to cause or likely to cause a shattering of peace and order, which the state has a right to do. This limitation on speech is within the state's constitutional power. As interpreted by the state courts in this case, Miss. Code Ann. §2089.5 (1966 Supp.) is not unconstitutional."

279 F.Supp. at 225.

(3) The district court independently found that the state court's conclusion (that petitioner's conduct in the light of the surrounding circumstances exceeded the bounds of argument and persuasion and was calculated to or could have led to a breach of the peace) was supported by evidence sufficient to support the jury verdicts.

279 F.Supp. at 226.

(4) Found under the evidence produced in the state courts that the action of the city police in this case probably averted what could have been a serious riot.

279 F.Supp. at 226.

(5) The entire record was reviewed by the Court of Appeals for the Fifth Circuit, the case was skillfully briefed and argued on behalf of petitioner, and the Memorandum Opinion of Judge Clayton approved and adopted, *per curiam*.

We submit that the record fully supports the findings of the state courts, that, as will be developed more fully on the merits of petitioner's contention, the action taken against petitioner was necessary to preserve law and order and avert a serious threat of a major riot and was therefore within the state's constitutional power, and that there is no "clear evidence of violation" which would war-

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rant federal intervention to overturn the state criminal conviction.

Oddly enough, petitioner in this case is forced to the position of asking this Court to reverse the Court of Appeals for the Fifth Circuit for doing exactly what this Court did on the first petition for certiorari.

II

**In determining whether §2089.5 is unconstitutional as infringing upon petitioner's First Amendment rights, it must be examined as construed and applied by the state courts.**

**A. Both the trial court and the Supreme Court of Mississippi narrowly construed and narrowly applied §2089.5 to preserve petitioner's First Amendment rights.**

We would agree with petitioner's position that both convictions rest on the validity of the arrest for breach of the peace. It is obvious that if the initial arrest were invalid, petitioner may not be convicted of resisting an invalid arrest.

Essentially, whether petitioner's First Amendment rights were violated is a question of fact, i.e., it depends upon what he was doing, how he was doing it, under what circumstances, what he was saying, and what the effect of his actions was at the time of his arrest.

As succinctly put by Mr. Justice Holmes in the famous case of *Schenk* v. *U. S.*, 249 U.S. 47, 53 (1919), "It is a question of proximity and degree." Under our system of jurisprudence, this is the classic example of the type question a jury is called on to resolve. The jury has the opportunity to observe the live witnesses, has the ad-

vantage of the nuances of inflection and demeanor, and is in a better position than any appellate court to sift the true facts from the false.

In reviewing the action of the state courts, some understanding of the state procedure is both necessary and helpful. It is, we think, pertinent that two separate state juries and the City Court judge have found adversely to petitioner on the merits of his case.

Mississippi jurisprudence has no such thing as a special verdict where a jury may be required to return specific findings of fact. Under our practice, the trial judge may not sum up or comment on the testimony, or charge the jury as to the weight of the evidence. Each party is required to request, in writing, instructions to the jury as to the law of the case.

Mississippi Code of 1942 (Recompiled) §1530.[2]
In practice and in effect, each party embodies in his requested instructions his theory of the law applicable to the case which are given to the jury. In both concept and function, the jury is the trier of the fact. It is the duty of the jury to obey the instructions of the court and to be thereby limited, and it is presumed to have done so

2. §1530. Instructions. The jury in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused," as the case may be, and all instructions so marked shall be a part of the record on appeal without a bill of exceptions.

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in reaching its verdict. This is a long-established rule in Mississippi.

*Cheatham* v. *State*, 67 Miss. 335, 7 So. 204 (1889);

*Illinois Central R. Co.* v. *Harper*, 83 Miss. 560, 35 So. 764 (1903).

See, also: *1 Alexander, Mississippi Jury Instructions* (1953), §10.

In this case, the petitioner requested, and was given, the following instruction which presented his theory of the case to the jury:

> "The Court instructs the jury for the defendant that if you find that the defendant was arrested for peaceful protest against racial segregation, *then you cannot find the defendant guilty.*" (R. 22) (Emphasis added.)

The theory of the prosecution is contained in this instruction, also given to the jury:

> "The Court instructs the jury that if you believe from the evidence in this case *beyond a reasonable doubt* that CHARLES McLAURIN did, on or about 1 July 1963, within the corporate limits of the City of Greenville, Washington County, Mississippi, disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace, then it is your sworn duty to return the following verdict:
>
> 'We, the jury find the defendant guilty as charged.'" (R. 20, 21) (Emphasis added.)

On appellate review, these instructions must be read together. Under Mississippi practice, this principle is so well established as to make citation of authority superfluous. The late Judge Alexander states the rule as follows:

> "No rule is better buttressed by judicial repetition than that which requires that all the instructions be read together, and that defects or omissions may be supplied by other instructions. It is as if there was but one instruction compounded of the matters in the several charges."
>
> 1 *Alexander, Mississippi Jury Instructions* (1953), §224.

Thus, the trial court presented to the jury precisely the issue argued here by petitioner; i.e., that if they believed *beyond a reasonable doubt* that petitioner did "disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace," then the jury was to find petitioner guilty, BUT if the jury "find" that petitioner had been arrested "for peaceful protest against racial segregation, *then you cannot find the* [*petitioner*] *guilty.*"

That is to say, as a condition precedent to conviction, the jury was required to find that the petitioner had exceeded the limits of "peaceful protest." Two juries so found as a matter of fact, implicit in the guilty verdict.

It would be fair to say that *four* juries have reached the same result on the same set of facts, taking into consideration the two trials of Charles Earl Cobb.[3] (See: Petitioners' brief on former petition, R. 227)

We therefore submit to this Court that the trial court effectively limited the application of §2089.5 to preserve petitioner's First Amendment rights.

In the Supreme Court of Mississippi, the affirmance of petitioner's conviction must be considered in the light

3. Mr. Cobb failed to surrender after the earlier denial of certiorari.

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of *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So.2d 667 (1965), which was argued and submitted on the same day as the case at bar. There, a group of young Negroes had staged an unannounced "march-in" at a desegregated public park. Incensed by their attitude, a crowd of angry, hostile whites had gathered and was snowballing, despite efforts of police to move them on. Violence was threatened, and the 4 or 5 policemen called to the scene concluded that the crowd had exceeded their capacity to control it. The defendant was ordered to leave, and refused. She was arrested under §2087.5, Mississippi Code of 1942 (Recompiled),[4] and convicted. The Supreme Court of Mississippi there held that the possibility of disorder from others cannot justify exclusion of persons from a place if they otherwise have a constitutional right based upon the Equal Protection clause of the Constitution to be present. In that case, Judge Brady said:

> "Appellee urges that the case at bar should be sustained by giving to Mississippi Code Annotated, section 2087.5 (Supp. 1964) a very narrow and specific construction. That is to say, this Court should hold that a statute must be limited to situations where, *as applied to persons exercising a guaranteed constitutional right in a peaceful manner*, they refuse to obey the police order to move on if, but only if, there is a clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order. This contention is precisely what was urged in the Thomas case, *supra*, and was completely ignored by the United States Supreme Court, and rejected by that tribunal in the Thomas, Garner and Cox cases, *supra*.

4. "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: * * * crowds or congregates with others in or upon * * * [a] recreational area or place * * * and who fails or refuses to disperse and move on * * * when ordered so to do by any law enforcement officer * * * shall be guilty of disorderly conduct * * *."

"The constitutional rights of this appellant, under the facts herein, cannot be denied because of hostility, for some unknown reasons, on the part of a group of white citizens, to the exercise of these rights." 253 Miss. at 665, 666. (Emphasis added.)

Thus, the Supreme Court of Mississippi has plainly held, in so many words, that regardless of whether the public peace will be disturbed, regardless of the possibility of a riot, a person may not be punished under the laws of this state *if he is exercising a constitutional right.* In affirming petitioner's conviction, the Court said:

"* * * The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. *The statute as construed by the trial court is not unconstitutional.*"

*McLaurin* v. *City of Greenville,* 187 So.2d 354, 359 (Miss., 1966).

In the last analysis, whether the petitioner *was* exercising First Amendment rights in a "peaceful protest" under the circumstances of this case is a *factual matter.* Two separate juries, with opportunity to see and hear petitioner testify, and to evaluate the truthfulness of his testimony, have held that he was not engaged in any peaceful protest.

Two state appellate courts, the Supreme Court of the United States, and a United States district court and the Court of Appeals for the Fifth Circuit have fully reviewed the record, have concluded that the trial court gave a

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constitutional application of §2089.5, and have let these convictions stand.

**B. §2089.5 is neither vague nor overbroad.**

Within the framework of the limitations placed upon the statute by the Supreme Court of Mississippi—i.e., that it may not be applied to infringe upon or unduly limit speech protected by the First Amendment—§2089.5 meets the standards of constitutional certainty. In *U. S.* v. *Petrillo*, 332 U.S. 1 (1947), Mr. Justice Black stated:

> "* * * The Constitution has erected procedural safeguards to protect against conviction for crime except for violations of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."
> 332 U.S. at 7-8.

Two recent cases bear upon the point.

In *U. S.* v. *Woodward*, 376 F.2d 136 (CA 7th, 1967), the court had under consideration the Illinois disorderly conduct statute, attacked on the same grounds as here. There were two defendants. Woodward had left the hearing room where the House Committee on Un-American Activities had been conducting a hearing for a trip to the washroom. When he returned, the marshals were clearing the room for the noon recess. Woodward attempted to re-enter after being instructed not to do so, was blocked and told to leave, and then, declaring that if he were going to leave the marshals would have to carry him, fell limp on the floor.[5] The other, Seelig, jumped to his feet

5. Cf. petitioner's similar conduct. (R. 207)

during the course of the testimony of a witness and began shouting, "Being an American citizen, I don't have to sit here and listen to these lies." When he refused to stop shouting, he was removed from the building by several marshals. The statute provided:

> "A person commits disorderly conduct when he knowingly * * * does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace."
> 376 F.2d at 139.

In affirming convictions under this statute, which had not been construed by the Illinois courts, the court had this to say:

> "The statute proscribes conduct that is so unreasonable as to 'alarm or disturb' another and provoke a 'breach of the peace.' The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. *It includes not only violent acts but acts and words likely to produce violence in others.*' Cantwell v. State of Connecticut, 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The term connotes conduct that creates consternation and alarm. *It is an indecorum that incites public turbulence; yet violent conduct is not a necessary element.* * * *"
>
> 376 F.2d at 141. (Emphasis added.)

The court then went on to hold that the statute was not unconstitutionally broad as applied to defendants' conduct because they were engaged in activities protected by the First Amendment, stating:

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> "* * * We do not think that the conduct of either defendant was constitutionally protected."
> 376 F.2d at 142.

Compare this statement of the Court taken from *Wright* v. *City of Montgomery*, 282 F.Supp. 291 at 295 (DC, MD, Ala., 1968):

> "* * * A person whose conduct is 'hard core' within the meaning of a statute cannot successfully avail himself of a 'vagueness' defense. See Dumbrowski v. Pfister, supra, Note 5, 380 U.S. 490, 491, 85 S.Ct. at 1116; United States v. Woodward, 376 F.2d 136 (7th Cir. 1967); United States v. Jones, 365 F.2d 675 (2nd Cir. 1966)."

Petitioner *knew* that his "vigorous and stirring" words were uttered in a tense situation:

> "* * * They [the crowd] were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done. But then all it needed was a leader, * * *"
> (R. 202)

It is ridiculous for petitioner to urge that under those circumstances he was going to talk about voter registration. Significantly, he requested no instruction to the effect that he could not be convicted if the jury believed he was urging the crowd to become qualified voters, and the record includes both instructions granted by the trial court and those requested but refused. (E.g., Defendant's Instruction No. 4, R. 23)

The court distinguished, as did the district court below, between cases dealing with the threat to First Amendment freedoms occasioned by the *discriminatory application* of broadly worded statutes, and *the narrow and proper application* of such a statute to conduct not constitutionally protected.

In *Cameron* v. *Johnson*, ..... U.S. ....., 20 L.Ed.2d 183 (1968), the Supreme Court had under consideration the Mississippi anti-picketing statute, attacked on the same grounds. After holding that the language was sufficiently precise, the Court then dealt with appellant's argument that it was void for "overbreadth" in that "'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' . . . *Zwickler* v. *Koota*,[6] supra, at 250."

After holding that picketing and parading are subject to reasonable regulation, the Supreme Court then followed *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (*Cox* II), relied upon by petitioner, quoting from it in its holding:

> "* * * The statute is therefore 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring it within constitutional protection.' *Cox* v. *Louisiana, supra,* at 564."
> 20 L.Ed.2d at 188.

Curiously enough, in his dissenting opinion to *Cameron* with whom Mr. Justice Douglas joined, Mr. Justice Fortas said:

> "* * * If the pickets had been disorderly or had obstructed use of the sidewalks or access to the courthouse, the police, subject to constitutional limitations, could have arrested them under various statutes."
> 20 L.Ed.2d at 192.

Among the statutes cited by Mr. Justice Fortas in the footnote to the above quotation was "Mississippi Code §2089.5 (disturbance of the peace)."

6. 389 U.S. 241 (1967).

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**C. As applied in this case, §2089.5 is constitutional.**

The fallacy in petitioner's argument is his basic premise that the actions for which he was prosecuted and convicted were constitutionally protected, and his counsel's reliance upon the assumption that the content of the petitioner's harangue was voter registration.

As developed under paragraph A, above, two successive juries have affirmatively found that the petitioner was not engaged in any "peaceful protest" at the time of his arrest. This brings the case under the rule of *Feiner* v. *New York*, 340 U.S. 315 (1951), where the offense charged was disorderly conduct, but involving language strikingly similar to that of §2089.5. The conduct condemned was that "with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned."[7] In that case, where the defendants were tried by a court without a jury on conflicting evidence, the conclusion that the police officers were justified in taking action to avoid a breach of the peace was approved by two appellate courts. Here, discounting the denial of certiorari by the Supreme Court of the United States, two separate juries confirmed the judgment of the city judge, the Circuit Court and Supreme Court of Mississippi, the district court, and the Court of Appeals for the Fifth Circuit have all reached the same judgment of approval, based on the same evidence. In fact, Judge Clayton (now a member of the Court of Appeals) held below:

> "This court judicially knows that over almost all the length and breadth of this country, speeches cast in strikingly similar language, protesting police action in what petitioner here calls 'a vigorous and stirring nature', have preceded barbaric savagery, bloodshed,

7. 340 U.S. at 318.

> death, looting and the wanton destruction of millions of dollars of property. The roll of the places where peace and order were not maintained—where the thin veneer of civilization was torn asunder—is a long and disgraceful one: Watts, Hough, Rochester, Trenton * * *.
>
> "In Greenville prompt and efficient police work, which went directly to the source of trouble and then established unquestioned control, which was promptly followed by dispersal of what petitioner's counsel described as a 'mob', probably averted what could have been another such tragic occurrence in that community."

*McLaurin* v. *Burnley, supra*, 279 F.Supp. at 226.

In *Feiner*, the Supreme Court pointed out that the judgments and reviews below supported the proposition that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare.

> "* * * and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted *for the making or content of his speech. Rather, it was the reaction which it actually engendered.*"

340 U.S. at 319-320. (Emphasis added.)

In the case at bar, as we have pointed out in the Supplemental Facts, above, although petitioner now contends he was making a speech about voter registration, he never, in fact, ever said a single, solitary word on the subject; that is what he "intended." A careful reading of his testimony on each trial will show that the petitioner never testified that he *actually ever made any such statements.*

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However, even conceding that his harangue may have included some such statement, there is no shred of evidence to the effect that petitioner was arrested or that his arrest was sanctioned because the police disagreed with the *content* of petitioner's speech, or because voter registration was an unpopular issue. Here, there was not and had not been any obstacle to Negro registration; in fact, if anything, it had been encouraged for a long period of years. Petitioner had been engaged in voter registration[8] in Greenville for nine and one-half months without hindrance or let. Petitioner's suggestion, therefore, that he may have been arrested because of *what* he was saying, rather than because of *what the effect was*, just doesn't hold water, and it is not supported by any bit or piece of evidence from any member of the crowd or mob, nor is there any suggestion in the evidence that the respondent has ever attempted to suppress unpopular views.

We submit that *Feiner* is controlling on the facts in this case.

Petitioner's principal reliance is on *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), and *Cox* v. *Louisiana*, 379 U.S. 536 (1965) (*Cox I*).

As the court held below, these cases are clearly distinguishable.[9] It is not the statute, it is the application. As put by Mr. Justice Douglas in an earlier case,

> "* * * We can only take the statute *as the state courts read it.* * * * *The pinch of the statute is in its application.*"
>
> *Terminiello* v. *Chicago*, 337 U.S. 1, 6 (1949). (Emphasis added.)

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8. "My job is voter registration, to get Negroes registered to vote." (R. 107).

9. 279 F.Supp. at 225.

In both *Edwards* and *Cox I*, the Supreme Court held that the defendants were engaged in constitutionally protected activities, and that they had not exceeded the bounds of that protection. It is obvious from the facts of those cases that this is so.

Cf.: *Bolton* v. *City of Greenville, supra.*

In the case at bar, both juries were instructed that if they believed the petitioner was engaged in a peaceful protest, he could not be found guilty. In *McLaurin* v. *City of Greenville, supra,* the Supreme Court of Mississippi specifically held that the petitioner had exceeded the bounds of constitutionally protected speech. Should there be any doubt from the first opinion, it should be removed by the opinion in *McLaurin* v. *City of Greenville,* 187 So.2d 860 (Miss., 1966), sustaining the conviction for resisting arrest.

Respondent has a valid interest in preserving order and in preventing riots, violence, looting, and the indiscriminate destruction of property that has occurred in other parts of this nation, and this interest overrides any possible right of the petitioner. This Court should be governed by the ground rules laid down nearly 50 years ago by Mr. Justice Holmes in the famous case of *Schenk* v. *U. S.*, 249 U.S. 47, 52-53 (1919):

> "* * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. [Citations omitted] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to protect. It is a question of proximity and degree."

See, also, *Cox II, supra.*

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**D. There is no relationship between Gunn v. University Committee to End the War in Viet Nam and the case at bar which would justify the granting of certiorari.**

In *Gunn* v. *University Committee to End the War in Viet Nam*, Oct. Term, No. 269, a very sticky problem is presented. As we understand the factual situation, members of the respondent organization were thrusting themselves into the middle of a crowd of some 25,000 military personnel, their dependents, and civilians from in and around the central Texas area assembled to hear an address from the President of the United States.

> "The signs used by the group were neither abusive nor obscene. Thereon were printed such slogans as 'I Have but One Idol—Hitler. "General Ky";' 'The War in Vietnam May be the Initial Phase of World War III. "U Thant";' and 'Wrong War, Wrong Time, Wrong Place. "General Shoup".' However, members of the group knew that many of the servicemen were Viet Nam veterans; that the tremendous crowd at Fort Hood had peaceably assembled to hear their Commander-in-Chief; and that any untoward incident would likely cause the police, military and civilian, to react quickly to safeguard the President of the United States. As the group moved nearer to where the President was speaking, the epithets became angrier, and the general atmosphere of hostility was more pronounced. One member of the group stated that he had been dismayed at the sight of so many soldiers, but decided to proceed anyway. All of this, of course, lends credence to the argument that plaintiffs should have foreseen that a continuation of their protest, under the circumstances, would, in reasonable probability, provoke a disturbance, and possibly even end up in violence. See Feiner v.

New York, 340 U.S. 315. *But in our disposition of this case we do not reach and, therefore, do not decide this issue.*"

*Gunn, supra,* Slip Opinion, p. 2, Footnote 1. (Emphasis added.)

Thus, the three-judge court whose opinion is to be reviewed did not reach the issue which is the heart of the case at bar, but rest their decision purely and simply upon the overly broad language of the Texas statute, which had had no limiting construction by the Supreme Court of Texas.

In our case, the Supreme Court of Mississippi dealt with almost precisely the same factual situation in *Bolton* v. *City of Greenville, supra,* and held that §2087.5, Mississippi Code of 1942 (Recompiled), could not be used to deny Negro children the right to be present in a park where they had a constitutional right to be, notwithstanding the fact that their presence in a hostile crowd and under the circumstances existing at the time might result in violence. It is the *application* of the statute which is unconstitutional, as is pointed out in more detail, *supra.*

In *Gunn,* the statute was applied to restrict activities of members of the respondent organization; in *Bolton,* the Supreme Court of Mississippi held that the threat of violence, however imminent, was no justification for restricting exercise of a constitutionally guaranteed right.

We might add that we do not agree with the holding in *Gunn* or in *Bolton.* It seems to us that the very existence of freedom of any sort depends upon the maintenance of an ordered society in which there is a mutual respect by one group for the rights of the other. Where one group deliberately and purposefully injects itself into the other group for the purpose of disrupting a peaceful

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assembly, under the guise of "freedom-of-speech" it seeks to deny that other group its opportunity to exercise the same rights. One need look no further than the recent presidential campaign in which George Wallace (with whom we do not agree and whom we do not support) was repeatedly heckled and harassed in his attempts to advance his candidacy before groups of supporters assembled to hear his views.

There should be some basic relationship between freedom of speech and the concept of common courtesy, plain every-day politeness, and a basic respect of rights of others. There is some point where the right of freedom of speech must yield to the rights of society, not in *whether* an individual may exercise the right, but *how, where,* and *under what circumstances* as considered in the light of conflict with the rights of others.

Compare: *Cox I, supra;*

*Adderley* v. *Florida,* 385 U.S. 39 (1966);
*U. S.* v. *Woodward, supra.*

We might add that the actions of the members of the respondent group in *Gunn* remind us very much of the actions of a cowbird—that lays its eggs in the nest of another bird.

We respectfully suggest that petitioner's attorneys, who are not lacking in resourcefulness, seek to obtain certiorari by riding in on *Gunn's* coattails, hoping to take advantage of this Court's known tendency to group cases presenting different aspects of the same problem.

## III

**Strong policy considerations require that petitioner now pay the penalty for his actions.**

If we, like petitioner, had behind us the unlimited resources of the NAACP Legal Defense and Educational Fund, Inc.,[10] we, too, would stay out of jail as long as possible. But the net effect of cases like this, multiplied by the hundreds, has been to cripple local enforcement of law and order. Prior to *Greenwood* v. *Peacock*, 384 U.S. 808 (1966), some citizens engaged in what may be loosely termed civil rights activities evaded punishment by the simple expedient of removal to the federal courts and swamping trial dockets with the sheer weight of numbers. Others, like petitioner, drag it out in the courts.

The natural result of these tactics was to clothe a "civil rights worker" with a cloak of invincibility, and to engender the notion that one engaged in such activities may not be held accountable under state laws or city ordinances. This reached the point where the Supreme Court of the United States felt it was necessary to make this pronouncement:

> "* * * Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, 379 U.S. at 554-555 and 563-564, 13 L.Ed.2d at 484 and 491, 492. We reject it again."
>
> *Adderley* v. *Florida*, 385 U.S. 39 (1966). (A case involving, as in the case at bar, a demonstration at the jail.)

10. See: *NAACP* v. *Button*, 371 U.S. 415 (1963).

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People like petitioner are in a community one day and gone the next, leaving behind unrest, a false sense of security, and the mistaken impression that the citizens of that community do not have to obey any law with which they disagree, and are not subject to any reasonable restraints. It is difficult, if not impossible, to maintain law and order under such circumstances.

After reviewing prior decisions, Mr. Justice Goldberg summed it up rather neatly in *Cox I, supra*:

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."
> 379 U.S. at 554.

*Cameron, supra,* and *Cox II, supra,* both involved demonstrations in the vicinity of court houses; *Adderley, supra,* involved a demonstration at the jail. In the case at bar, the demonstration took place on the front steps of the Municipal Building which housed both the city jail and the city court. The city court was then still in session. (R. 42)

The arrests took place in the presence of a crowd of citizens of this community variously estimated at from 150 to 225 or more. They know what petitioner was saying, and they know what he was arrested for, because it took place in their immediate presence. It is essential to the preservation of law and order in this community that these

citizens know the law applies alike to all, regardless of race, creed or color, and that all have to meet the same standards of justice.

While we are doubtful as to their evidentiary value, nevertheless newspaper accounts of petitioner's actions and his statements when he was to commence serving his sentences are, by stipulation, a part of the record in this case, and appear at pages 233 and 234. Without further comment, we suggest that these news accounts give something of the flavor of this case—and that flavor is not good.

## CONCLUSION

As recognized by Judge Clayton, below,

> "Much, much more, than the simple arrest of a 'civil rights worker' is involved here. At stake is the right of a community to preserve the peace and to protect itself from riots and disorder."
> 279 F.Supp. at 226.

We respectfully submit that petitioner has had his day in court and more. Due process of law does not require that a defendant agree with his conviction; it requires only that he not be convicted without a fair trial on the merits by a jury of his peers, and that he be accorded at least one appellate review. Not counting the denial of certiorari by the Supreme Court of the United States, petitioner has had his initial conviction reviewed with two jury trials *de novo* in the county court, by the circuit court, by the state supreme court, the entire proceedings searchingly examined by a district court of the United States, and still another appellate review by the Court of Appeals for the

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Fifth Circuit. He has had a gracious plenty of due process, but the time has come, now, to pay the piper.

Respectfully submitted,

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**CERTIFICATE**

I hereby certify that on November 27, 1968, I caused a copy of the foregoing Reply Brief of Respondent to be served by United States air mail, postage prepaid, upon the petitioner by mailing three copies of the same each to:

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